

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEORGE E. ZELKO,

Appellant,

v.

JOHN P. STRADER and JANE DOE
STRADER, husband and wife,

Respondents.

No. 39551-7-II

UNPUBLISHED OPINION

Bridgewater, J. — George E. Zelko appeals the trial court’s order granting John Strader’s motion for summary judgment and the trial court’s order denying Zelko’s motion for reconsideration. We hold that (1) Strader was not entitled to raise a defense of insufficient service of process because he had waived that defense and (2) the trial court judge erred by

reconsidering another judge's order *sua sponte* more than 10 days after the order's entry. We reverse and remand with instructions to reinstate Zelko's complaint.

FACTS

On June 30, 2008, Zelko filed a complaint in the Cowlitz County Superior Court, alleging that Strader negligently operated a boat in the Kalama Marina on August 5, 2005. Zelko alleged that the superior court had jurisdiction over Strader because he (1) committed a tortious act within Washington State; and (2) owned, used, or possessed real or personal property in Washington State. From July 7 to at least October 8, Zelko attempted service by publication on Strader, who had moved to California.

On November 26, Zelko moved for an order of default. Zelko alleged that he had served Strader by publication; more than 60 days had elapsed since service; and while Strader had appeared, Strader had failed to file an answer or otherwise plead. On December 5, Strader filed an answer *pro se* acknowledging that he lived at a California address at which Zelko had attempted service. Strader denied Zelko's allegations and asserted a statute of limitations defense.

Strader retained counsel after filing his answer and on February 11, 2009, Strader's counsel moved to amend his answer. Strader sought to amend his answer to add, *inter alia*, lack of "jurisdiction" and insufficient service of process defenses. CP at 30. Zelko responded that Strader had waived any personal jurisdiction and insufficient service of process defenses under CR 12(h)(1) by not including them in his original answer. Zelko also argued that the statute of limitations had not run because he filed his complaint within three years of the incident and served

Strader within 90 days of filing his complaint. Thus, Zelko argued that justice did not require allowing Strader to amend his answer.

In Strader's reply, he argued that any failure to comply with CR 12(h)(1) should be excused because he answered pro se. Strader further argued that service by publication in California was improper because Zelko failed to show that Strader was a resident of Washington or left the State to avoid service. Strader planned to show at a CR 12(b) hearing that he had left Washington for reasons unrelated to this lawsuit.

On April 20, Judge James Stonier denied Strader's motion to amend his answer to include lack of personal jurisdiction and service of process.¹ Strader then moved for summary judgment before Judge James Warne, arguing that no genuine issues of material fact exist and the statute of limitations had expired. Strader contended that the statute of limitations expired because Zelko had not timely and properly affected service of process.

Zelko responded and again argued that Strader waived his affirmative defense of insufficient service of process. In addition, Zelko argued that service of process was proper.

Judge Warne granted Strader's summary judgment motion, finding that (1) under *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969), Strader's absence from Washington did not toll the statute of limitations; and (2) service by publication was improper under RCW 4.28.100(1)-(8). Judge Warne therefore dismissed Zelko's complaint. Zelko filed a motion for reconsideration, arguing that whether Strader left Washington to conceal himself was a genuine issue of material fact. Strader responded that Zelko had raised no new issues, and only

¹ Zelko did not include in the record a transcript of this hearing.

referred the trial court to the parties' summary judgment briefings.

Judge Warne denied Zelko's motion for reconsideration and found that (1) Strader did not waive his defense of insufficiency of service of process because he filed his original answer pro se and no prejudice existed, and (2) Zelko failed to show strict compliance with RCW 4.28.100. Judge Warne incorrectly found that Judge Stonier's earlier ruling denying Strader's motion to amend was "never reduced to a written order." CP at 140. In addition, he found that, "Upon reflection and reconsideration, that ruling was probably error and is reversed." CP at 140.

ANALYSIS

I. Motion for Summary Judgment

A. Standard of Review

We review an order granting summary judgment de novo, and engage in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). We must consider all reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

Initially, while Zelko designated the order granting Strader's summary judgment motion in

his notice of appeal, he has presented no argument or citation to authority. His assignments of error do not mention the trial court's summary judgment motion. Zelko has therefore waived this error. RAP 10.3(a)(4); RAP 10.3(g); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.2d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005). But Zelko's brief makes clear the nature of his challenge. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006), *review denied*, 160 Wn.2d 1012 (2007). He appeals from the summary judgment order because Strader had waived his CR 12(b) affirmative defenses and could not use those as a basis for a summary judgment motion. Accordingly, we consider his arguments on appeal.

B. Strader was Not Entitled to Judgment as a Matter of Law

A defendant waives the affirmative defense of insufficient service of process unless asserted in either a responsive pleading or a CR 12(b) motion. CR 12(h)(1). If the defendant does not comply with CR 12(h)(1), the trial court may permit the defendant to amend his or her answer in accordance with CR 15(a). CR 12(h)(1)(B). If a defendant moves to amend his answer more than 20 days after serving it, he or she may amend only by leave of the court or by written consent of the adverse party. CR 15(a). Leave to amend should be freely given when justice so requires. CR 15(a).

Strader did not properly raise his CR 12(b) defense in his answer and did not bring it in a CR 12(b) motion as required by CR 12(h)(1). He moved to amend his answer more than 20 days after filing it, but the trial court denied his motion. Strader did not move for reconsideration, seek discretionary review, or appeal after trial. And, as discussed below, Judge Warne had no authority to reconsider Judge Stonier's order denying Strader's motion to amend his answer.

Strader therefore did not comply with CR 12(b) or CR 12(h)(1) and he waived his affirmative defense of insufficient service of process. Because he waived insufficient service of process, Strader was not entitled to rely on it as a basis for summary judgment.

Strader argues that he need not preserve his insufficient service of process defense to assert a waiver of the statute of limitations. He argues that such requirement is overly formalistic for a pro se litigant like himself. Whether Strader received insufficient service of process and whether the statute of limitations expired are two separate inquiries. Statute of limitations is an affirmative defense that CR 8(c) requires the defendant include in his answer. A defendant must assert insufficient service of process in an answer or motion pursuant to CR 12(b). Strader attempts to conflate the two arguments to avoid Judge Stonier's order denying his motion to amend his answer. Strader had avenues open to him to seek review of Judge Stonier's order and he did not take them.

Strader was not entitled to judgment as a matter of law. The trial court erred in granting Strader's summary judgment motion. *Kahn*, 90 Wn. App. at 117. We vacate the summary judgment order, and remand to the trial court with instructions to reinstate Zelko's complaint.

II. Motion for Reconsideration

A. Standard of Review

We review a trial court's decision to grant or deny a motion for reconsideration for abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). An abuse

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of discretion exists only if no reasonable person would have taken the view adopted by the trial court. *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987).

B. Untimely Reconsideration

Zelko argues that Judge Warne erred in reconsidering Judge Stonier's order because more than 10 days had passed since Judge Stonier entered his order. A motion for reconsideration is timely only if the moving party files the motion within 10 days of the order's entry. CR 59(b). The local rules may not reduce or extend this time period. CR 6(b); *King County v. Williamson*, 66 Wn. App. 10, 13-14, 830 P.2d 392 (1992).

Here, Judge Warne denied Zelko's motion for reconsideration, but also "reconsider[ed]," *sua sponte*, Judge Stonier's ruling denying Strader's motion to amend his answer. CP at 140. Judge Stonier's written order was filed on April 20, 2009, and Judge Warne issued his order on June 23, 2009. More than 10 days had passed since Judge Stonier's order denying in part Strader's motion to amend his answer. Reconsideration was not appropriate. Judge Warne abused his discretion by reconsidering Judge Stonier's order more than 10 days after it was entered. We therefore vacate that order and remand.

But, Judge Warne did not abuse his discretion by denying Zelko's motion for reconsideration. A motion for reconsideration must be based on one of the nine reasons enumerated in CR 59(a). Zelko did not argue that he met any of the CR 59(a) bases for reconsideration. Judge Warne did not abuse his discretion by denying Zelko's motion. But, because the underlying summary judgment order was incorrect, this analysis does not change our outcome.

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We vacate Judge Warne's orders on summary judgment and on reconsideration and remand with instructions to reinstate Zelko's complaint.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Bridgewater, P.J.

We concur:

Hunt, J.

Van Deren, J.